

JOE HAND PROMOTIONS, INC.,)	Case No.: 5:10-CV-04177-JW
)	
Plaintiff,)	
)	
v.)	ORDER DENYING MOTION TO
)	ALTER OR AMEND JUDGMENT
SEAN PAUL CROCE, individually and d/b/a)	
CROCE'S EAST COAST EATERY, et al.,)	
)	
Defendant.)	
)	

commentary. *Id.* ¶ 10. According to Plaintiff's complaint, filed on September 16, 2010, Defendant illegally intercepted and displayed the Program at his business establishment in violation of federal and state law. *Id.* ¶ 13. Based on the allegations contained in its complaint, Plaintiff brought four causes of action against Defendant: (1) Violation of 47 U.S.C. § 605, *et seq.*; (2) Violation of 47 U.S.C. § 553, *et seq.*; (3) Conversion; and (4) Violation of California Business and Professions Code § 17200, *et seq.*

B. Procedural Background

Plaintiff filed its complaint on September 16, 2010. On November 17, 2010, this case was reassigned to Judge Ware of this District. Dkt. No. 7. On January 3, 2011, after Defendant failed to respond to the complaint, Plaintiff moved for entry of default against Defendant. Dkt. No. 10. On January 6, 2011, the Clerk entered default. Dkt. No. 11.

On January 21, 2011, Joe Hand moved for default judgment. Dkt. No. 12. On April 4, 2011, the Court held a hearing on the default judgment motion. Dkt. No. 15. On that date, the court entered judgment against Defendant for a total amount of \$4,303.73, consisting of: \$1,000 in statutory damages under 47 U.S.C. § 605; \$1,200 in compensatory damages for conversion; \$1,115 in costs; and \$988.73 in attorney's fees. Dkt. No. 17.

On May 2, 2011, Joe Hand moved to alter or amend the judgment of the Court with respect to the statutory damages.¹ Dkt. No. 18.

II. ANALYSIS

This Court may alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e). Rule 59(e) is generally seen as "an 'extraordinary remedy, to be used sparingly'" and at the discretion of the Court. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted); *see McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003). This motion "'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (citation omitted) (en banc).

¹ The Honorable James Ware is no longer assigned to this case. The pending request came to the undersigned Judge's attention as the General Duty Judge for the month of May 2011.

1 “To succeed [on a motion to alter or amend judgment], a party must set forth facts or law of a
2 strongly convincing nature to induce the court to reverse its prior decision.” *United States v.*
3 *Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001).

4 Here, Plaintiff presents no newly discovered evidence, and concedes that the controlling
5 law has not changed. The motion to alter or amend judgment is brought under the theory that the
6 court committed clear error.

7 In the motion to alter or amend judgment, Plaintiff suggests three points of clear error on
8 the part of the Court. Mot. at . 5-9. First, Plaintiff argues that the Court’s decision to grant the
9 minimum statutory damages, while consistent with other Northern District of California opinions,
10 is inconsistent with the decisions of District Court judges in other judicial Districts. *Id.* at 5.
11 Second, Plaintiff argues that the Court’s characterization of the Plaintiff’s evidence of willfulness
12 on the part of the Defendant as “mere assertion” was erroneous, based on the evidence presented
13 regarding the means by which Defendant obtained the Program, the number of patrons who viewed
14 the Program, the national trend in such cases, and the goal of damages in piracy cases. *Id.* Third,
15 Plaintiff suggests that the Court miscalculated damages when it defined the screening of the
16 Program as one violation, as opposed to counting each patron’s viewing of the Program as a
17 separate violation. *Id.* at 9.

18 Courts grant reconsideration due to clear error “only if the prior decision was ‘clearly’
19 wrong.” *Bull v City & County of San Francisco*, 758 F. Supp. 2d 925, 928 (N.D. Cal. 2010) (citing
20 *Leslie Salt v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995)). “A district court does not commit
21 clear error warranting reconsideration when the question before it is a debatable one.” *Morales v.*
22 *Tingey*, No. C 05-3498 PJH, 2010 U.S. Dist. LEXIS 20776, at *1 (N.D. Cal., Feb. 3, 2010) (citing
23 *McDowell*, 197 F.3d at 1256). Therefore, before Plaintiff’s motion may be granted, the Court must
24 find an indisputable error in its election of minimum statutory damages, in its characterization of
25 the Defendant’s alleged willfulness, or in its method of calculating damages.

26 A. Minimum Statutory Damages

27 If the Court determines the Plaintiff is entitled to damages, the amount of those damages is
28 set by what “the court considers just.” 47 U.S.C. § 605(e)(3)(C)(i)(II) (2006); *see also Kingvision*

1 *Pay-Per-View, Ltd. v. Backman*, 102 F. Supp. 2d 1196, 1198 (N.D. Cal. 2000). Plaintiff contends
2 that the Court committed a clear error in its award of the statutory minimum, and points to a trend
3 in awarding higher damages as evidence of error.

4 Plaintiff asserts that awarding minimum statutory damages is contrary to the practice in
5 other Districts and to recent decisions from judges in the Northern District of California. Mot. at 5.
6 In support of this assertion, the Plaintiff puts forth three “cases decided since Plaintiff filed its
7 Application for Default Judgment [that] bear upon the issues herein.” *Id.* Each of these cases
8 comes from the Eastern District of California and was decided in early February, after the filing of
9 the Application but well before the April 4, 2011 hearing on the motion for default judgment in this
10 case. *Id.* Therefore, as Plaintiff concedes, there has been no intervening change in the controlling
11 law.

12 The Court’s decision to follow Northern District precedent rather than the cases cited by
13 Plaintiff could only be an error if it were bound to follow those cases. However, the decisions of
14 fellow district courts, while persuasive, are not binding on this Court. *See ATSI Communs., Inc. v.*
15 *Shaar Fund, Ltd.*, 547 F.3d 109, 112 (2nd Cir. 2008) (noting that “[d]istrict court decisions . . .
16 create no rule of law binding on other courts.”); *see also Allegheny General Hospital v. NLRB*, 608
17 F.2d 965, 970 (3d Cir. 1979) (explaining that precedent binds only those cases “arising in the same
18 court or a lower court in the judicial hierarchy”). When the authority at issue is only persuasive,
19 and not binding, the Court may exercise its discretion in deciding an issue. That the Court chose to
20 follow Northern District precedent rather than the Eastern District’s recent cases does not
21 constitute an error, much less an error so clear as to necessitate altering or amending the judgment.

22 Plaintiff also refers the Court to cases cited in Plaintiff’s original Motion for Default
23 Judgment. Plaintiff argues these cases show a trend of “more significant damages . . . being
24 awarded.” Mot. at 5. However, a motion under Rule 59(e) “must show more than a disagreement
25 with the Court’s decision, and recapitulation of the cases and arguments considered by the court
26 before rendering its original decision fails to carry the moving party’s burden.” *Westlands*, 134 F.
27 Supp. 2d at 1131. In any case, the Court has reviewed Plaintiff’s Motion for Default Judgment,
28 and has observed that the cases cited in support of awarding maximum statutory damages are from

1 fellow district courts in North Carolina, Texas, and the Eastern District of California. While this
2 Court respects the opinions of its fellows, it is not, for the reasons mentioned above, obligated to
3 follow them. As the Court has both the discretion to determine the amount of damages within
4 statutory guidelines, and the discretion to choose which persuasive authority to follow, the Court
5 did not commit clear error in deciding to award minimum statutory damages rather than maximum,
6 notwithstanding the decisions of courts in other districts.

7 B. Willfulness

8 Plaintiff next declares that the Court's conclusion that Plaintiff provided a mere assertion of
9 willfulness on the part of the Defendant was "clearly erroneous." Mot. to Alter or Am. J. at 6.
10 Heightened damages may be granted at the discretion of the Court "in any case in which the court
11 finds that the violation was committed willfully and for purposes of . . . commercial advantage or
12 private financial gain." 47 U.S.C. § 605(e)(3)(C)(ii).

13 Plaintiff refers the Court to *J & J Sports Productions, Inc. v. Ho*, in which the defendant
14 was found to have acted willfully. No. 10-CV-01883-LHK, 2010 U.S. Dist. LEXIS 109575 at *4
15 (N.D. Cal. Oct. 5, 2010). Plaintiff claims that *Ho* supports finding "that the act of piracy
16 necessarily evinces willfulness." Mot. to Alter or Am. J. at 6. However, as described above, Judge
17 Ware was no more bound by the *Ho* decision than by any other district court decision when
18 deciding this case. In *Ho*, the Court properly exercised the discretion allotted to it by 47 U.S.C. §
19 605, first in determining the defendant's conduct was willful, and then in determining the extent of
20 damages appropriate given that willfulness.

21 The statute contemplates the Court using its discretion to determine willfulness, and to
22 determine the amount of damages appropriate in light of willfulness. In its Order Granting
23 Plaintiff's Motion for Default Judgment, the Court stated that, "the mere assertion that defendants
24 acted willfully is insufficient to justify enhanced damages." Order at 5. Plaintiff's evidence of
25 willfulness was an affidavit from Joe Hand, proprietor of Joe Hand Promotions, Inc., that "to the
26 best of [his] knowledge, [Plaintiff's] programming is *not* and cannot be mistakenly, innocently, or
27 accidentally intercepted." Pl's. Aff. at 3. For the reasons stated above, the Court could, remaining
28 within its discretion, find this evidence insufficient to prove willfulness on the part of Defendant.

1 The Court is neither required to find willfulness in every violation, nor is it required to
2 increase damages for every act of willfulness. The statute states that the Court “*may* increase the
3 award” if it finds willfulness. 47 U.S.C. § 605(e)(3)(C)(ii) (emphasis added). As the Court is not
4 obligated to enhance damages even upon a finding of willfulness, the Court acted within its
5 discretion in deciding that the evidence presented by Plaintiff was insufficient to justify enhanced
6 damages.

7 As the Court’s discretion in this decision is derived from the statute, and the Court
8 remained within this discretion in considering the evidence and the damages, the Court did not
9 commit such clear error as to justify altering or amending the judgment.

10 C. Damages Calculation

11 While the statute provides for minimum and maximum damages, it does not specify the
12 manner in which the court must calculate statutory damages. 47 U.S.C. § 605(e)(3)(C)(i)(II), (ii).
13 Accordingly, courts have the discretion to decide “which of the defendants’ acts constitutes a
14 violation,” and to “determine the number of violations and assess damages for each violation.”
15 *Kingvision Pay-Per-View, Ltd. v. Lalaleo*, 429 F. Supp. 2d 506, 513-14 (E.D.N.Y. 2006).

16 Plaintiff asserts that “this Court’s decision also fails to take into account the number of
17 patrons present.” Mot. to Alter or Am. J. at 8. Plaintiff points to the recognition, in *Ho*, of a
18 significant customer presence, and to the specific method of calculating damages used by Judge
19 Fogel of the Northern District, as “demonstrating the willingness of the Northern District courts to
20 award significant enhanced damages.” Mot. at 8-9. In *Ho*, the “significant enhanced damages”
21 were an additional \$10,000, which was awarded, in part, based on the defendant’s repeated
22 violations. *Ho, supra*, at *5. The two cases adjudicated by Judge Fogel, to which Plaintiff refers
23 the Court, awarded damages by multiplying the number of customers present by the licensing fee
24 for the program at issue. *J & J Sports Prods. v. Guzman*, No. 5:09-cv-05124-JF/HRL, 2010 U.S.
25 Dist. LEXIS 113351, at *6 (N.D. Cal. Oct. 14, 2010); *J & J Sports Prods. v. Cortez*, No. 5:10-cv-
26 02717-JF/PSG, 2011 U.S. Dist. LEXIS 11247, at *7 (N.D. Cal. Jan. 28, 2011). Unlike the present
27 case, these cases found liability and awarded damages under 47 U.S.C. § 553, not 47 U.S.C. § 605.
28

1 *Id.* But even if these cases had been decided under § 605, they would not require this Court to
2 award enhanced damages in this case.

3 Plaintiff argues that the value reached through multiplying the commercial fee by the
4 number of customers present in Defendant's establishment accurately reflects Plaintiff's damages.
5 Mot. at 9. While this is a sensible way to calculate damages, it is not the *only* way to calculate
6 damages, and Plaintiff has failed to establish that the Court erred by determining damages in a
7 different way.

8 The Court has discretion both in deciding whether to award damages, and in determining
9 the amount of that award. *Kingvision Pay-Per-View, Ltd. v. Scott E's Pub, Inc.*, 146 F. Supp. 2d
10 955, 958 (E.D. Wis. 2001) (noting that "[a] court has great discretion in awarding statutory
11 damages"). One method of damage calculation used by Courts "where there has been no evidence
12 of the plaintiff's actual usage or commercial advantage, [is] applying the statutory minimum."
13 *DirectTV, Inc. v. Montes*, 338 F. Supp. 2d 352, 355 (D. Conn. 2004). In this case, the Court
14 exercised the discretion given to it by 47 U.S.C. § 605, to determine that it would grant an award to
15 the Plaintiff, and to set that award at the statutory minimum. In exercising this discretion, the
16 Court committed no clear error sufficient to justify amending or altering the judgment.

17 Because the Plaintiff has failed to identify a clear error by the Court, the Court DENIES
18 Plaintiff's motion to alter or amend the judgment.

19 III. CONCLUSION

20 For the reasons set forth above, the Court DENIES Plaintiff's motion to alter or amend the
21 judgment.

22 **IT IS SO ORDERED.**

23 Dated: June 29, 2011

24 
LUCY H. KOH
United States District Judge